

The CASE HAWARDEN

OF

DIVORCE

AND

RE-MARRIAGE thereupon
Discussed.

By a Reverend Prelate of
the Church of *England* and
a private Gentleman.

Occasioned by the late Act of
Parliament for the Divorce
of the


Lord R o s s e.

*I know that Messias cometh which is
called Christ, when he is come he
will tell us all things, Joh. 4. 25.*

L O N D O N, Printed for Nevill
Simmons at the Prince's Armes in
St. Pauls Church-yard. 1673.

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READER,

THese Papers
were drawn
up when the
Business of the
Lord *Rosse* was de-
bated in Parliament,
and had their rise
A 4. from.

113

To the Reader.

from That trans-
action. The first
part of them was
Written by a pri-
vate hand, and was
occasioned by a Dis-
course with a learn-
ed Bishop now with
God upon that Sub-
ject, and being pre-
sented to him, he re-
turned the follow-
ing Animadversi-
ons

To the Reader.

ons upon it, to
which the Answer
Here set down was
Then given by the
same hand. The
whole is now made
publick for thy in-
formation and satis-
faction about this
matter.

A 5 *Touch-*

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*Touching Divorce and Re-
marriage thereupon.*



AN incapacity for the ends of marriage, previous to it, makes a Nullity of the marriage upon a subsequent discovery of it. This needs no determination by any positive Law; For the Law of Nature, and the reason of the thing it self gives an universal deter-

termination of it every where.

By the Law of *Moses*, unchastity before Marriage or contraction (if concealed) and all unchastity after Contraction or Marriage, was to be punished with death, and no mention made in the Law of any such thing as Divorce in that Case.

Moses in the 24th of *Deuteronomy*, gave This allowance for Divorce, *vers.* 1, 2. When a man hath taken a Wife, and Married her, and it come to pass that she find no favour in his eyes, because he hath found some uncleanness in her : Then let him write her a Bill of
Di-

Divorce discussed. 3

Divorcement, and give it in her hand, and send her out of his house ; And when she is departed out of his house, she may go and be another mans wife ; which was but an allowance in some Cases, and in thole too did rather *liberare à Pœna* than a *Vitio*. We need not inquire farther why this was done : our Saviour has given us a perfect account of it ; such a permission was granted to them, because of the hardnels of their hearts, and the unruly stubborn behaviour of the Jews towards their Wives in that particular. *Moses*, who we are to consider

sider as a Legislator to a State, as well as a Church, suffered it to be, as the most tolerable remedy that That people were capable of, and in favour chiefly of the Women.

This permission of *Moses* came in the practice of it to be so far extended amongst them, that whoever desired to put away his Wife, was allowed to do it without giving any reason at all, besides his own pleasure why he did it. This we may see in *Mr. Selden's Uxor Hebraica*; and *Grotius* tells us, *Quod Consuetudo legis interpretes Nullam à marito*
can-

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*causam dirempti Matrimonii exegerit ; and adds, Alio-
qui enim non potuisset Jo-
sephus Maria clam dimit-
tere : Potuit igitur Mari-
tus dicere quod Romæ dixit
Paulus Emilius, sibi optimè
notum quâ calcens urgeret.*
This custome was in it self
greatly inconvenient, and
as one sayes of it, For a
man, *Nulla aut levissima de
causa uxorem dimittere, ut
Jam de primæva dei insti-
tutione nihil dicam, vel sola
charitatis lex prohibebat,
sive uxorem respicias, quæ
veluti supplex ad Mariti
Tutelam confugit, sive com-
munes etiam liberos.* Hea-
then Nations rarely pra-
ctised

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etised any such thing, the Romans in particular, of whom an antient Author sayes, *Romani, cum nulla lex repudium vetaret, annos tamen quingentos & viginti sine exemplo repudii gerunt: Nec quisquam fermè scriptorum, est qui non graviter reprehendat Marcum Tullium Ciceronem, quod levibus de causis Terentiam dimiserit.*

Our Saviour in the Gospel, before the Pharisees asked him any Question about this matter, (which they did, and their Question and his answer is set down in the 19th. of *Matthew*, and the 10th. of *Mark*)
de-

Divorce, Discussed. 7

determines it in the 5th. of *Matthew* in his Sermon upon the Mount, there being indeed nothing wherein That people needed more Reformation than in That particular ; His words are *verse* the 31 ; *It hath been said, whosoever shall put away his Wife, let him give her a Writing of Divorcement ;* And *verse* the 32. But I say unto you, *that whosoever shall put away his Wife, saving for the cause of Fornication, causeth her to commit Adultery and whosoever shall marry her that is Divorced, committeth Adultery.* By this it is plain, that whatsoever

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HAWARDEN.

toleration they had from *Moses* about putting away their Wives, and whatsoever farther liberty they took to themselves in That matter, it is totally repealed and condemned, and no cause of divorce and putting away allowed to be good, but in case of Fornication and Unchastity.

There ariseth this difficulty from the consideration of our Saviour's words; whether he he did thereby intend to institute a new Law in the Case; or, whether he only spake Interpretatively with reference to the Law of God Then in being. Those who are inclined

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inclined to think he did institute a New Law, urge it from hence, That our Saviour speaks of Fornication and Unchastity as a ground, and the only ground of Divorce, which by the Law had another punishment appointed for it, and such a one as made Divorce impossible and impracticable, for they were to be put to death that were so found guilty, and of That Law, our Saviour takes no notice; say they, the punishment the Law appointed to be inflicted for Fornication and Adultery, and the direction our Saviour gives about it cannot consist

consist together, the one directs Divorce, the other appoints death. I suppose our Saviour in what he Here determines about this matter (as in many other of his determinations about other things) speaks so, as that he gives a full satisfaction to men according to the present state of things then in being; and also establisheth a Divine Law upon such grounds that shall last for ever in the Church.

For the first, That he spake with reference to the Law Then in being, and to settle the Consciences of men, who desired to perform

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form their duty as things
Then stood, I gather from
hence. First, because he
spake to such who were
then all of them under an
obligation to the whole
Mosaical Law, for so were
the Jews, and Christ's own
Disciples to whom he
Preached.

Secondly, He plainly
seems all along that Cha-
pter to comment upon the
Law of *Moses* and Evange-
lize it, and to give the true
and genuine meaning of it,
against the corrupt and per-
verse interpretations of the
Scribes and Pharisees; And
when he sayes, *But I say*
unto you, he does not so much
oppose

oppose himself and what he said Then, to *Moses* and what *Moses* had said Before, as to what the Scribes and Pharisees had falsely said in *Moses* name, and so rather vindicates the true sense and intention of the Law under his own name. And though his determinations in some things exceed the Law, yet in all things they contain the true sense and end of the Law.

Thirdly, When the Scribes and Pharisees asked our Saviour in the 19th. of *Matthew* about this matter what lawfully might be done in it, our Saviour answers them with the very same de-

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determination, and therefore 'tis plain he spake with reference to what was at that time to be accounted Legal, according to the Laws and institutions of God Then in force ; and there is nothing in what our Saviour sayes, that does any way contradict the Law of God in being, but gives a satisfaction to mens Consciences how they were to behave themselves under it.

We must note this, that our Saviour is singly upon the point of Divorce and putting away, he meddles not at all with the Law about Adultery, but leaves it to its due execution ; His saying,

saying, That crime was the only lawful cause of Divorce did not prejudice it from any greater punishment due to it, he only determines about the matter of Putting away and Divorce, and he determines thus in opposition to the Jewish practice, and the first permission of *Moses* to them, that there is no cause at all upon which a Wife may be put away, but where the marriage-bond is dissolved, which is only in the case of Fornication and Adultery, where the Woman was Then legally dead, and ought to be put to death, if prosecuted and the fact proved, and that

Divorce, Discussed. 15

that all putting away the Wife upon any other ground is unlawful and sinful. Now this determination of our Saviour about Divorce might be a satisfaction to men in Conscience, and a ground for them to put away their Wives for Fornication and Adultery, though the Law of God against Fornication and Adultery to punish it with death was unrepealed, and they under the obligation of it, and that in three Cases.

First, The Law did not oblige the Husband to go to the Judge, and prosecute his Wife for Adultery;
B Nor

Nor does our Saviour im-
 pose farther in that case than
 the Law did upon him, and
 therefore such who were
Lenes mariti, as *Joseph* was,
 and had no mind to prose-
 cute their Wives to extre-
 mity, were by this deliver-
 ed from a necessity, either
 to live with an Adulteress,
 or else to prosecute her to
 death, and are set free in
 Conscience to give her *Li-
 bellum repudii*, and part from
 her.

Secondly, Supposing a
 man could not have Justice
 done upon an Adulterous
 Wife, when he did his best
 in prosecution of her, (and
 this was like enough to be
 the

Divorce, Discussed. 17

the condition of many a man
in that corrupt state of things
amongst the Jews at that
time, and was actually so,
the execution of That Law
having been for a long time
forborn, and well may we
think it should be so, for all
Capital punishment was at
that time taken from the
Jews, and not in their pow-
er, so the *Sanhedrim* confess,
John 18. 31. 'Tis not law-
ful for us to put any man
to death,) in that case our
Saviour gives free liberty for
the Husband to divorce him-
self from her, and make use of
that freedom the Jews took
and putting away.

B 2 Thirdly,

Thirdly, Supposing a man were inwardly satisfied of his Wives unchastity, and certainly knew within himself, she were guilty of Adultery, yet had not such proof as would make it out in a Judicial way to gain Execution of the Law against her in putting her to death in such a case, (which we may easily suppose might often fall out) our Saviour sets the mans Conscience free to put her away, and Divorce himself from her; In all these cases our Saviour allowing Divorce in case of unchastity was of great use. Then to settle the Consciences of men, who were obliged

Divorce, Discussed. 19

man liged to the Law, and no
of infringement at all of the
and Law it self : He gives a rule
im to limit that exorbitant li-
dul be:ty men took to them-
boof selves of putting their Wives
n away, and tells them in what
Exe case only it may be done,
inf which was in case of For-
ath nication, and that might ve-
we ry well happen to be the
gh Case, though the Law for
our punishing it with death were
fre still in force, and so our Sa-
Di viour speaks of it as it might
I Then accidentally relate to
our Divorce and putting away,
o but no way layes any Arrest
uf upon the punishment the
sci Law inflicted upon it.
ob The truth is, our Saviour

B 3

pro-

promulged such a general Law in the case, as gave a sufficient determination as things Then stood, and might satisfie mens Consciences what Then to do in the point of Divorce, and was to be also a Rule to the Church about that matter to all future Ages. That our Saviour intended it so is very evident from those general grounds upon which it is established, and all the circumstances that attend it. Nor is there one word in that whole Chapter but is of that nature, 'tis Evangelical as well as Legal, and looks forward to the Gospel-Church to come, as well

as

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as it contains a direction to the present Church of the Jews; Whereever throughout that Chapter our Saviour speaks of any Law in force amongst the Jews, even of the Judicial Laws, he induceth by his determinations about them that Equity that was moral and perpetual in them, and to last for ever in the Church. It seems also necessary there should be some direction left by our Saviour in this point, or else the Church under the Gospel would have been wholly without any Rule about it, and there could never have been upon any terms whatever any such

B 4 thing

thing as Divorce practised in the Gospel-world, for what *Moses* permitted about it was accidental and temporary and peculiar to the Jews, and our Saviour shews us the rise of it, and the reason of it, and forbids all farther practice of it ; The Law against Adultery and uncleanness determined those crimes another way, and besides That Law of punishing Adultery with death was purely Judicial, as much as punishing a disobedient child with death was so, and wholly relating to the Jewish Oeconomy ; 'Tis true, the offences in these cases were moral and natural evils, and do
still

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still so continue, but That manner of punishing them Then, was Judicial and temporary. We see at This day 'tis not a general established Law, no not in the most Christian Nations to punish Adultery with death, and therefore our Saviour, who was guided by infinite wisdom in all he did, spake so as might give satisfaction to every Conscience under the Law at That time, upon what terms only to make use of the liberty of Divorce and putting away, Then so frequently and commonly practised, and also gave a perpetual Rule to the Church, that the bond of

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marriage should be preserved Sacred, and upon no account but that of Fornication dissolved, and in That case whatever the Laws of particular States might be about it, yet the obligation of marriage ceased, and the Consciences of men were for ever set free.

This Doctrine of our Saviour about Divorce established in the 5th. of *Matthew*, is again repeated by him in the 19th. of *Matthew* in answer to the Pharisees, who there questioned with him about the same matter; He there tells them, there is no cause lawful for a man to put away his Wife, but

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but only Fornication, and that he admits to be a lawful cause, and the only lawful cause. In the 10th. of *Mark* our Saviour's discourse is set down without the exception of Fornication, and runs general, that whoever puts his Wife away, and marries another, commits Adultery, and so in the 16th. of *Luke* our Saviour says, without any of the circumstances in his other discourses of it, in the general, and without the exception of Fornication, That whosoever shall *put away his Wife and marry another commits Adultery*. It must be noted, that what *Mark* sets

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sets down, in the 10th. of *Mark*, is the very same story recorded by *Matthew* chapter the 19th, and both the Evangelists give an account of the same discourse between our Saviour and the Pharisees at one and the same time; That is so clear, that 'tis not to be denyed, and therefore whatever is set down by *Matthew* must be admitted to belong to the story, and be implied in it, though omitted and not expressed by *Mark*, and so whatever is in *Mark*, that *Matthew* hath omitted, must be likewise supposed to belong to the story, or else we must imagine the Evangelists

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gelists not to be both in the right in their relation of the same story, which cannot but be, and therefore *Matthew* expressing that our Saviour added That exception, (except in the *cause of Fornication*) 'tis to be supposed and implied in the relation *Mark* makes of the story, though he express it not, neither in what he said to the Disciples nor to the Jews themselves, for the answer is There general to both; *Calvin* in his Harmony upon the Evangelists sayes upon this place, that 'tis the same story related in both places, and there is no other difference, sayes he, but

but that one sets down the matter of our Saviours discourse more fully than the other, it being, sayes he, most usual for one Evangelist to omit some passages and circumstances in the same story mentioned by another.

Saint *Luke* in his relation of what our Saviour said about this matter, omits all the circumstances of his discourse, and only mentions in short this general expression of our Saviour, That *who-soever should put away his wife and marry another, committed Adultery*, which is evidently spoken of those unlawful Divorces daily practised

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practised amongst the Jews,
and directed against Them.

Some conceive that our Saviours determinations in this point were intended with a distinction; that is, that when he spake in general against putting away without any exception, he spake relatively to his Disciples, and to the Gospel-Church to come; but when he spake of it with the exception of Fornication annexed to it, he intended That only with relation to the Jews, and so the exception Now concerns not us, but was only meant to Them, and terminated There.

Very

Very many things strongly oppose this apprehension ; First, in the 5th. of *Matthem*, where our Saviour gives the first, and most solemn determination about this point, 'tis plain he spake to his Disciples, as well as the multitude of the Jews ; For the Chapter begins, *And seeing the multitudes, he went up into a mountain ; and when he was set, his Disciples came unto him ; And he opened his mouth and taught them saying, &c.* And he often in that Sermon directed his discourse particularly to his Disciples, for so he did in the 14th. verse, where he tells them, *ye are the*

Divorce, Discussed. 31

the salt of the World ; A City set on an hill cannot be hid ; which must be spoken to them : Nor was there any reason why our Saviour should Preach one Doctrine in this matter to his Disciples, and another to the Jews ; For the Disciples were equally obliged Then to the Law, and concerned in all that the Jews were, and therefore the same Doctrine must needs be common to them both.

Secondly, We find not the least ground from any thing our Saviour said any where to make any distinction in this matter, to believe the Rule was given general

neral to one sort of men, and with an exception to another, but we find the Rule often generally laid down by our Saviour with this general exception annexed to it, and in that case where our Saviour once gives a general rule, with a general exception annexed to it, wheresoever our Saviour after repeats the same Rule, we must suppose the exception, or else we can never be able to make our Saviour to agree with himself. Nothing more usual than to imply remote exceptions under generals to reconcile the Scripture with it self, much more

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more in This case, where our Saviour himself so often joyned the Rule and the exception together. Our Saviour bids us positively in the same Chapter not to swear at all, in general terms, yet every man that is sober will, under This general, imply all the lawful swearing the Scripture any where else enjoins or approves, because we must not make the Scripture militate with it self.

Thirdly, There can be no good reason to limit what our Saviour said about Divorce in the 5th. of *Matthem* and the 19th. of *Matthem* to the Jews only, but
we

we must needs admit it to be a general Law given in the case to all Ages, because he grounds his determination about it, not upon the Judicial Law, but upon reasons drawn from the general Law of Nature, and the first institution of marriage by God in the Creation of man and woman at the beginning, and such general principles, as had no peculiarity at all to the Jews, (though they were obliged by them) but such wherein all mankind were equally concerned : Our Saviour opposed the Pharisees and the Judaical practice, and establishes the Law he in-

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introduceth about it, by reducing the matter of Marriage and Divorce to the primitive rule of it, and to the natural and perpetual reason of the things in themselves considered, and therein spake not only to them, but to all mankind, and to the whole world ; He directs them to look to the first rise and original of Marriage, God made at first but one man and one woman, a male and a female, and appointed Them two in those two kinds to be in the relation of Marriage one flesh, so that Nature and Institution, the very Laws of mans first Creation, make the marriage-

age-Union very sacred, and from thence our Saviour derives his direction about it ; And for Divorce, whereas the Jews upon every trivial occasion allowed it, our Saviour denies it to be lawful upon any occasion but one, and that grounded upon the natural and general reason of the thing in it self considered : The very essence of the marriage-Union, both by nature and primitive institution lyes in this, that two are one flesh ; where fornication is committed the Union is dissolved, for as *St. Paul* tells us, *whoever joyns himself to an Harlot, is one flesh*

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flesh with her, and so in cases of such turpitude two are no longer one, but three or four or more in that marriage-sense of oneness, and so the oneness of two in marriage, which is the essence of it being dissolved, the marriage it self must needs be so likewise, nor can it in reason be supposed to continue, where the ends of God and Nature in that relation are frustrated and made void : And this could not be limited to the Jews, nor have a peculiar and single respect to Them, being founded upon principles that are common and universal, moral and perpetual,
and

and wherein the interests of all men concenter, so that if it were lawful Then for a Jew, or any man, to put away his Wife for Fornication, upon those grounds upon which our Saviour declares it to be lawful, it seems reasonable to think it must continue to be so for every man to the worlds end, because those grounds are in their own nature general and perpetual, and will Justifie the doing of the thing for ever.

Fourthly, There seems to be no ground of belief, that our Saviour should indulge the Jews in this point, and frame this exception only for

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for Them, and not intend it to others, but rather the contrary, That he should have particularly restrained Them in this matter more than others, because of their enormous practices this way above any other Nation in the World; Besides that the general Rule without the exception, has a fairer interpretation towards Them than any, and our Saviour might well say, pointing only to Them *Whoever puts away his Wife*, (that is, as your manner of putting them away now is) *and marries another, commits Adultery*: There seems no reason at all to appropriate
C that

that exception to Them,
especially when 'tis made
upon grounds common to
all.

Fifthly, To confine that
Rule our Saviour Then gave
about Marriage and Di-
vorcé, as he conjoyned
them, to the Jews only at
That time, and to extend
it in that conjunction no
farther, is to confine it to
that interpretation, wherein
'tis most hard and difficult to
be understood, and deny the
effects of it, where the inter-
pretation lyes most plain and
easie. To our selves under
the Gospel the direction of
our Saviours Law is plain
and evident, and without any
difficulty

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difficulty may be put in execution, but in its relation to the Jews; and the state of things Then, it seems somewhat-obscure, and without an admittance of a non-execution in some cases of the Law of God Then in force, for punishing Fornication and Adultery with death, very hard to be understood, and therefore 'tis no way reasonable to relate the Law solely to Them, and deny the benefit of it to our selves.

The practice in the Christian Church seems to have been regulated by our Saviours direction, and Divorces admitted in case of Fornication. The Emperour *Theo-*

C 2 *desus,*

dosus, who, as one sayes of him, was *Christianus & pius*, & *Episcoporum quotidiano usus concilio*, made Laws for a man to put away his Wife in case of Fornication and Adultery, and extended it to the very suspicion of it. *Sufficere Judicavit, si mulier viro ignorante, vel nolente extraneorum virorum convivio appetere, si ipso invito sine Justa & probabili causa foris pernoctaret, nisi apud suos Parentes, vel si Circensibus theatralibus, vel Ludis & Arenarum spectaculis ipso prohibente gauderet.* The Emperour *Justinian* made many additions to these Laws, which although for the

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the manner of them, we must suppose accommodated much to the Customes of those times, yet were all built upon our Saviours direction in that case. St. Jerome is positive, That, *Ubiunque est Fornicatio, & Fornicationis suspicio liberè uxor dimittitur*; which yet we must not extend to every Jealous suspicion, but suppose spoken, *Ne ad legum subtilitatem res semper exigatur*, and must be understood with restriction; 'Tis no way fit a mans own Jealous apprehension should be always the rule in the case, and yet in matters of That nature it may so fall out, that a man may be certain of that

of which he can make no evident proof. St. *Aufine* plainly takes our Saviours direction Then to be the rule Now in this matter, in his 89th. Epistle, says he, *Domini præcepit, ne quisquam uxorem dimittat, excepta causâ Fornicationis.*

Divorce à mensâ & toro seems to be a fiction in the Canon-law, and to have no ground, neither in any Law of God, nor in reason. Not in any Law of God, for wheresoever divorce was allowed by any Divine Law, it was a total Divorce, and the persons were allowed to marry again ; It was so amongst the Jews, whoever was

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was Then Divorced, might go to a second marriage; It is so in what our Saviour sayes, he evidently implies it, (putting away and re-marrying are conjoyned) *whoever*, sayes he, *puts away his wife, and Marries another, except for the cause of Fornication, &c.* where the implication is evident, that in that case of Fornication, he may both put away his wife, and also lawfully Marry another, the first marriage being dissolved: the word *ἀπολύει* constantly used by our Saviour in the New Testament for Divorce and putting away implies a nulling of the marriage and discharge

of the obligation, and signifies to absolve, loose, release, discharge ; so that if what our Saviour hath said about Divorce in case of Fornication be a rule to the Church Now, 'tis plain the Divorce allowed by him in that case admits of a second marriage: If it be not a rule to the Church Now, then there is not the least positive allowance under the Gospel for any Divorce at all, and if so, all Divorces a *Mensâ & Toro* are without any Divine warrant.

Not in reason, for whatsoever can be sufficient to Justifie a Divorce from all the ends of Marriage, must needs

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needs be sufficient to Justifie a Divorce from the obligation of Marriage, the one being but in order to the other ; It seems no way reasonable to bring any man into that condition, that the obligation of marriage should remain, and the helps and advantages of it be taken away ; 'Tis to divide what God hath joyned, for he never appointed the one to go without the other ; It seems very undecent to say, two shall continue one flesh, and yet be excluded from all converse each with the other. If the essential bond of marriage be broken (as in fornication), That gives a rational ground

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for

for a Total divorce; If it be not, while the bond continues unbroken, the duty ought to be performed, there appears no ground to suspend the one, and continue the other.

The practice of marrying again after Divorce hath been frequent; The Greek Church practise it generally. *Grotius* says, some Christians have thought better to forbear it, *Quam sententiam*, says he, *ex bonitate peculiari magis ortam, quam ex communi receptaque lege, tum ex aliis, tum ex Tertulliano apparet, qui non uno loco ostendit, solitos suo tempore ad matrimonium alterum admitti, qui ob Adulterium uxorem dimisissent.*

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dimisissent. Origen tells us, that in his time many Bishops allowed it. 'Tis not without the authority of some Councils, who have determined it lawful; *Conciliis, Eliberino, & Aurelianensi, & Arelatensi primo decretum est id licere.*

An-

RA 7410 (E.O. 108)



Animadversions upon the foregoing Dis- course.

1. **U**Nchastity before mar-
riage, in a Virgin,
not in a Widow.

2. Unchastity to be punish-
ed with death, if proved by
two witnesses, if but one wit-
ness Divorce, if only strong
suspicion the water of Jea-
lousie.

3. Found

3. Found some uncleanness ; some is a word superfluous, ἀχρηστον, the 72. Interpret. which is summam foeditatem carnis.

4. The learned men, Selden and Grotius have their opinion, yet the Rabbies say ; Albeit the liberty of the Law, few or none did use it : No instance of taking that license in Scripture ; Joseph finding the blessed Virgins Womb swelled, presumed he had Just cause to dismiss her : for he knew she could not contend with him in point of Law.

5. It is a strong argument to me, that whereas God says, the nations round about the Jews would admire their wise Laws, yet none of the Heathen had such a loose Law, as to divorce at every exception the husband took; It is Tertullian in his Apology, who says, that from Romulus to Sp. Camilius for 500. years Divorces were never heard of in Rome, and he began it upon the barrenness of his Wife. Tully broke good order above all men; For he married a young Gentlewoman, his Pupilla, his Ward, as we call it, that he might pay his debts with her Portion,

tion, he never prospered after it.

6. The Jews to this day confess in their writings, that the penalty for Adultery was not inflicted, as it ought to have been, chiefly because it was so hard to prove it by two witnesses, and the confession of the nocent party would not serve ; because no such Trial appears in their Law.

7. In Matthew there's mention of putting away, not a word to allow the innocent person to marry again : but here is a strong argument indeed, that the Law of Moses
never

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never allowed their petulant putting away for every cause; For Christ, as you well observe rendered the right sense of the old Law, gave no new.

8. When the marriage-bond is dissolved; That is presumed not proved.

9. Matth. 19. 9. is not every way the same determination with his doctrine, Matth. 5. ; for chap. 19. he speaks in his case that marries another, but Matth. 5. in his case that marries her that is put away. The Woman was not legally dead, if not convinced by two witnesses.

10. The

10. *The first case of Lenex Mariti, and the third of a prosecutor that could not prove, in the Event come all to one, That with a good conscience he might put the Adulteress away. I concur for putting away, but no farther; But for the second member, when he prosecuted openly against her and could not prove, Surely she ought to have the common benefit of all Law, to be recta in curiis, and the utmost must be to take the water of Jealousie.*

11. *If you speak of the 5th. of Matthew (not of the 19th.) it is true that it is a compleat*

Divorce, Discussed. 57

complete exposition of the right understanding of some points in Moses Law, in the morality. so to be in force for ever.

12. Punishment by death for Adultery not a general Law. But far more Nations have it, than others with whom it prevails not.

13. That Christ intended the obligation of the marriage should cease ; Presumitur non probatur.

14. Mark sets down the same story recorded by Matthew, that not to be denied. Yes, 'tis evidently to be denied,

ed, Matth. 19. 3. The Pharisees asked him about divorce, so Mark 10. 2. the Pharisees asked him about that matter; but read further, verse the 10th; and in the house the Disciples asked him again of the same matter, and he saith unto them, whosoever puts away his Wife, and doth marry another, commits Adultery, Luke 16. 1. The chapter begins, He saith to his Disciples, not to the Pharisees; Then at the 19th. verse, whosoever puts away his Wife, and marries another, commits Adultery, &c. To his Disciples our Saviour spake in Gospel rules, repealing the license

Divorce, Discussed. 59

license given to the Jews in their Law Judicial to marry again, if Divorced for Adultery ; I dissent from Calvine, who will have the same carriage of the story in in all the three Evangelists.

15. Very right, his Disciples were present at the Sermon, Matth. 5. but there is no mention of a giving allowance to marry after Divorce ; If you argue from Christs silence, that he forbids it not, 'tis your own assumption, but no argument.

16. Second Reason.] *What need*

need you more ground than the express words of Christ; you say, Why should the rule be general to one sort of men, with exception to another? Nay, the general Doctrine is not to one sort of men, but to all the Children of God and Disciples of Christ, the exception is to the Jews, for the hardness of their hearts.

More strict duty required of Christians, for the exuberance of grace given us; *Abundantia spiritus sancti est Elogium regni Christi*; They are Calvines words. A command not to swear at all, is never in any place limited by exceptions, (except

Divorce Discussed. 61

(except to swear by the name of the Lord) but hath an hundred Texts to allow it justly done, so hath not this case which you put.

17. The third Reason makes against you. Christ cites original Scriptures, light of Nature, grounds not to be shaken but by the God of Scripture and Nature, who indulged to the Jews, that albeit those great obligations, they might marry after Divorce for Adultery; those times of infirmity God winked at, as he did at many superstitions of the Gentiles, but these are the times of reformation

formation under the Gospel.

18. If either commit Fornication, the Union is dissolved. *Gratis dicitur; For may not the innocent person remit the fault of foul lust to the other? deductosque jugo cogat alieno; may they not live together as Man and Wife? which could not be, if the union were intrinsically dissolved; As the Prophets do often challenge the Jews for spiritual Fornication of Idolatry, yet the Lord took them again to him for his people, and it hath a great Evangelical consideration in it, that for any trespass,*

Divorce, Discussed. 63

trespass, while the offended and the offender live together in this world, there may be a way left for reconciliation, and to take that admonition, sin no more lest a worse thing come unto thee: but marrying another while the offender lives, excludes all possibility of charitable pardon.

19. Fourth Reason.] Our Saviour did not restrain the Jews more than Moses had restrained, but expounds Scripture, that they had taken license above what God had indulged to them for the hardness of their hearts; It was the hardness of their
D hearts,

64 The Case of

hearts, that caused the wisdom of God to give them a latitude, the Lord being gracious to their infirmities ; But you would have God lay more burden upon them, because of their perverse hearts, which is not Gods method, but to whom much is given, of him much will be required.

20. Fifth Reason] soon satisfied ; whoever said that Christs precept about Divorce was enjoined Then to the Jews, and only at That time It was in force from the beginning without indulgence but in force with that indulgence from Deut. 24. and

Divorce, Discussed. 65

no time so opportune, as when Christ was on the earth, and spake with his own mouth to his Disciples, to let them know, they were not priviledged like the Jews, if their Wife were an Adulteress, but to take up their cross and bear it.

21. Divorce admitted in the Christian Church for Fornication, but superinduction of another Wife is another thing.

There were great mistakes in the Imperial Laws. Did not Valentinian make a Law for marrying within degrees prohibited? Others for Bigamy? I have not

D 2 leasure

*leasure to search the Books.
I lay St. Austine against
St. Jerome, who did not
write transcurforily, but two
studied Books upon the Ar-
gument.*

22. *Wky should not the
orders of the Canon-Law
be as rational as the Laws
of Theodosius and Justi-
nian? Separatio à toro &
mensa is for peace sake, till
opportunity of attoning.
Must all directions to keep
them aloof, that are imbit-
tered one against the other,
and to prove them for a
time how they will piece
again, be groundd upon
Scripture? Shall humane
pru-*

Divorce, Discussed. 67

Prudence have no hand in such things ? These are no fictions of the Canon Law, for they falsifie no Text, but make tryal of such ways as may conduce to the good of both parties. What if à toro & mensa have no divine warrant, is there any divine warrant against it ? They that look for divine warrant express in all frames of Government, in all circumstances of Gods worship, have been told sufficiently how much they mistake the purpose and use of Holy Scripture.

23. *You say, 'Tis not reasonable, that the obligation of marriage should remain, and the helps and advantages of it be taken away; why, what if a man or a woman be taken Captive? Incur an irremediable disease? or the Wife, though chaste, will not render due benevolence? or, her Joynture she brought be consumed by fire? Here are helps and advantages subtracted, yet no wedlock broken.*

24. *By Divorce à toro & mensa they are not shut from all converse with one another, they may return to mutual*

Divorce, Discussed. 69

*mutual embraces again ;
though the bond of marriage be not broken, the use and comfort may be suspended.*

25. *Far more Bishops by thousands have disliked it, than that have allowed it. I reverence the Councils, yet they were but Provincial ; Had I leisure to peruse them, I should know to interpret them.*

26. *Grotius lived in the Netherlands, and wrote after their practice and doctrine. It hath been the practice of the Church of England but once in Parliament,*

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liament, Edw. 6. and once in this late Session of Parliament. I take no pick at any man that is of a contrary judgement to me. But the first instance of Parre Marques of Northampton, who had two Children in secret, before the Act of Parliament passed on his side, makes his case far worse than the Lord Rosse's, but the Marques and his posterity sunk quite away, and let survivors behold the end of this last Instance.

For an Appendix, I will ingeniously add the unreasonableness of the Church of Rome, who generally deny him

Divorce, Discussed. 71

him that puts away his Wife for Adultery, to marry again, yet they consent to the sentence of Pope Gregory the first, who resolves this upon a question moved. Questio est, quidam parentes, mulieres presertim, proprios filios susceperunt in lavacro ; An illi viri & mulieres ad suum proprium redire possint usum ? Imo separent se mulieres ; vero cum separata fuerint pro hac illicita re à propriis viris, totam precipimus recipere dotem, & post expletum annum recipiant alium virum, similiter & viri uxorem ; which is easily thus refuted by their own

own doctrine, Si proprios filios in casu necessitatis baptizare, non solvit matrimonium, quanto minus eisdem è Baptismo suscipere ?

27. To end, such as hold to my opinion, lay it the more to Conscience, foreseeing that the contrary may stir up some wicked Husbands to suborn false witnesses upon Oath to convince innocent Wives, that They being divorced, it may admit them to marry where they like better. Moreover it may fall out, not seldom, that a wicked Woman

Divorce, Discussed. 73

man will confess her self
an Adulteress, upon assu-
rance of some ample com-
pensation. More might be
added.

The



*The Answer to the Animad-
versions.*

Animadversion.

I. **U**Nchastity before mar-
riage, in a Virgin,
not in a Widow.

Answer.

Answer.

The direction in the 22. of *Dent.* for conviction of unchastity before marriage relates peculiarly to a Virgin, and cannot be applyed to a Widow, yet should a Widow by other evident proofs be convicted of unchastity after the death of a First Husband before marriage to a second, the equity and reason of the Law seems to reach her ; 'Tis a firm Maxim in the Civil Law, *ut ubi eadem est ratio, jus idem valet*, I find no exception

Divorce, Discussed. 77

ception any where made in that case, nor any particular direction given about a Widows previous unchastity to a second marriage to punish it any other way.

Animad-

Animadversion.

UNchastity to be punished
with death, if proved by
two witnesses, if but one
Divorce, if only strong
suspicion the water of Jeal-
ousy.

Answer.

The first is evident, that
unchastity when punished
with death was to be proved
by two witnesses, not by rea-
son of any particular dire-
ction about the proof in
That case, but because God
established That as a general
rule

Divorce, Discussed. 79

rule for all Judicial proceedings, that by the testimony of two or three witnesses every sentence should be established, Deut. 19. 15.

One witness shall not rise up against any man for any iniquity, at the mouth of two witnesses or three shall the matter be established.

The second, that if unchastity were proved but by one witness, it was Then matter of Divorce, I crave leave to dissent from ; Unchastity, if proved, could never be ground for Divorce, for death was to ensue, so that if one witness in case of unchastity were sufficient proof, it produced death,

death, if it were not, it amounted to no more than suspicion ; Nor do I find any direction for any proof at all to be made as Necessary in case of Divorce, nor in any case, where proof was Judicially required was one witness sufficient, Neither by the first allowance of Divorce, *Dent.* 24. Nor in the subsequent practice of it amongst the Jews was there any proof required in case of Divorce, nor any Judgement to be passed by the Magistrate about it, farther than that there should be *libellum repudii* given to the Woman ; It seems to me that the judgement in
case

Divorce, Discussed. 81

case of Divorce rested in every mans own breast, though every man was in his own private conscience obliged by rules in his actings therein, and sinned if he transgressed them; For as one saith, God would by that expression in *Deut. quæ probrum, aut ut* 72 Interpr. *verterunt ἀφηναι γυναῖκα* significat, admonere Hebræos ne temerè uxores dimitterent, and sayes the same Author, *Notum est quosvis Judices quorum summæ & liberrimæ potestati res aliqua permittitur, insontes non esse, si ab æqui bonique regula discedant, jus ergo fuit, ut quavis de causa uxorem mari-*
tus

*tus possit expellere, sed ea
notione qua Prætor jus red-
dere dicitur, etiam cum in-
justè discernit, ut Paulus
Jurisconsultus loquitur, qui
& alibi dixit, non omne
quod licet honestum esse,
licere enim in Communi usu
aliquid dicitur, quod extra
pœnam est, & quominus
fiat à nemine impediri potest;*

The words of the Text cast
it that way (*And it come
to pass, that she find no fa-
vour in his eyes*) of which
himself could only be the
proper Judge; In the 19th.
of *Matthew*, where the Pha-
risees urged upon our Savi-
our, that *Moses* required no
more in the matter of Di-

vorce,

Divorce, Discussed. 83

vorce, but to give a writing of Divorcement, our Saviour does not deny it, but seems to admit it, only tells them, *Moses* did it for the hardness of their hearts, but from the beginning it was not so ; The antient form of their Divorces imports thus much. (*Mea sponte nullius coactus te uxorem hactenus meam dimittere, à me deferere ac repudiari decrevi, Jamque adeo te dimitto desero ac repudio atque à me ejicio, ut tua sis potestatis, tuoque arbitrata ac lubitu, quò licet discedas, neque id quisquam illo tempore prohibessit, atque ita dimissa esto, ut cuius viro nubere*

nubere tibi liceat.

Grotius seems upon good grounds to be positive in this case, his words are, *Errare autem eos, qui putant Judæis non licuisse uxorem dimittere, nisi causa apud Judicem probata, satis ex hoc loco apparet, Dictum enim esse, ait Christus, qui uxorem dimissam vult, libellum det repudii; Dubitationem omnem nobis Josephus eximit, qui de se agens ita ait,*
καὶ ὁν δὴ καὶ ἐν τῷ γυναικα μὴ ἀποκόμῳ αὐτῆς τοῖς ἰσραὴλ ἀντιπαρῶν. Verum tamen est hunc actum, non minus quam hereditatis Cessionem, atque alios solenniores solitos ceram Judicibus peragi, quod

Divorce, Discussed. 85

nos Digesta Talmudica docent, sed erat hoc jurisdictionis voluntariae non contentiosae, quomodo manumissio apud Praetorem Jure Romano; Cognitionem igitur suam judex non interponebat, nisi de dote aut donatione propter nuptias controversia inciderat, planè ut & apud Romanos.

And he adds after, *Ceterum ut graviora mala evitarentur, & veritatem & gravitatem causae noluit ad alienum arbitrium referri, sed ipsius mariti animo id aestimandum permisit; Quod mirum non est, cum veterum Gallorum, aliarumque Gentium leges jus vitae & necis*

neis in Uxores Maritis concesserint.

For the third, If strong suspicion, the water of Jealousie, I assent to it, he that doubted his Wives chastity, and in case he could be assured of her chastity, resolved not to part with her, and if she were found unchaste, desired the execution of the Law upon her, obtained his end by the Water of Jealousie ; But I much question whether That, being of an extraordinary nature, were enjoyed by the Jews till our Saviours time: I rather suppose they never had the benefit of it after the Captivity, but that the use

Divorce, Discussed. 37

use of it ceased, as it did of the *Urim* and *Thummin*, That Church being to determine, God removed the Pillars of it by degrees ; I believe in our Saviours time in fact things stood Thus ; The Law against Adultery was not executed, nor indeed was it in their power to have it executed, for the Romans had reserved matters of life to their own Judicatories, (though sometimes the people would violently stone some persons as they did *Stephen*) and upon that account amongst others they thought to insnare our Saviour in the 8th. of *John*, when they brought to him

E the

the woman taken in Adultery ; The water of Jealousie, they had not the use of, and so nothing was done in these cases, but only they made use of the liberty *Moses* allowed for Divorces.

Animad-

Animadversion.

Found *some uncleanness* ;
some is a word super-
fluous, ἀχνηρόν, the 72. In-
terpret. *which* is *summam*
foeditatem carnis.

Answer.

There is great disagree-
ment in understanding the
Hebrew words translated
(*some uncleanness in her*) ;
I shall make evident, it can-
not be restrained to uncha-
stity, for which the Law
had otherwise provided, if
either proved or suspected :

E 2 the

the Jews I confess differed much about it ; I find in Mr. *Selden* there were three Schools amongst them, that maintained three several opinions about it ; The School of *Hillel*, the School of *Sammai*, and the School of *Aquiba* : That of *Hillel* maintained it lawful for a man to put his Wife away for any cause, but not singly upon his own pleasure ; That of *Sammai* for somewhat of Turpitude only ; and That of *Aquiba*, that a man might put away his Wife upon his own pleasure without any ground at all ; That which was the most general received opinion

Divorce, Discussed. 91

nion amongst the Jews, he says, was, that for light causes, as dislike of Beauty, age, and many other such things, Wives might be put away, and he adds, *idque ex sacre legis mente*, according to the sense of the Law, and 'tis most certain they did so interpret it for the most part.

The School of *Sammai*, as *Grotius* observes, had the fewest disciples, and yet under the notion of turpitude they extended Divorce so far, that they thought a Womans going with open breasts a sufficient ground for it. *Philo* says, a man may Divorce his Wife for

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any

any occasion ; *de spec. l. g. ad præc. 7.* Josephus sayes, for any dislike of manners, and he practis'd accordingly, for he saith of himself, that he put away his Wife after he had had three Children by her, only because he disliked her manners. *Chrysostome* in his Homilies upon *Matthew* speaking of what the Pharisees said to our Saviour about Divorce, sayes he, *Erat hoc in veteri lege mandatum, ut qui propriam quacunque de causa odisset uxorem, non eam probiberetur ejicere, inque illius locum alteram ducere.*

Erasmus

Divorce, Discussed. 93

Erasmus hath with very great learning in his Treatise about Divorce proved that by Uncleanness in the 24th. of *Deut.* Unchastity cannot be meant, he is so confident and positive, that he stakes his credit upon it. *Ainsworth* and our best late Commentators render it exactly from the Hebrew, (matter of nakedness) or by transposing the words (any thing of nakedness) which, saith *Ainsworth*, is not meant of Adultery, but of some evil thing in her conditions or actions that displeased her Husband, and he adds that the phrase is so taken in the same sense for

E 4 any

any thing unseemly in the 23 of *Dent.* v. 14. Nor did I ever yet meet with any that thought the *Hebrew* word used in the 24 of *Dent.* as the ground of *Moses* permission of Divorce, could be rendred by the word *περὶ*, which is that used by our Saviour. But to put it out of all farther question, that the licence *Moses* gave to Divorce, cannot be restrained to Adultery and Fornication, there is this undeniable evidence ; If that were so, we must make our Saviour palpably to contradict himself, and at the same time to establish what himself repeals, and to do the

Divorce, Discussed. 95

the same thing which he finds fault with as done by *Moses*, being not that which was from the beginning, but that which was done only temporarily and occasionally for the hardness of That peoples hearts ; our Saviour's speech would Then run Thus, *Moses* for the hardness of your hearts suffered you to put away your Wives for Fornication and Adultery, which was not so from the beginning, (and so ought not to continue) But I say unto you, that whosoever puts away his Wife, except for Fornication and Adultery, and marries another, com-

E 5 mits

mits Adultery in so doing;
There needs no more than
our Saviours own words to
assure us that the liberty *Mo-*
ses gave for Divorce, and
That Christ gave were upon
different grounds: The plain
meaning of our Saviour seems
to be this, *Moses* heretofore
upon a particuler reason, be-
cause of the hardness of your
hearts, suffered you to put
away your Wives upon
grounds that were not in-
tended to be a lawful cause
of Divorce from the begin-
ning, I'll have that to be so
no more, but I'll have it to
be as it was from the begin-
ning, and from the beginning
there was no good cause of
Divorce

Divorce, Discussed. 97

Divorce but Fornication, and
This cause was a good cause
from the beginning and the
first institution of marriage,
and appears by our Saviours
interpretation of the first In-
stitution of Marriage to be
so, and to be implied in the
general institution at the first,
and reserved as much as the
service of the Temple, and
liberty to works of mercy
and necessity are declared by
him to be reserved and im-
plied in the first positive in-
stitution of the Sabbath,
though not expressed; so
that, if we look to the liber-
ty given by *Moses*, our Sa-
vours Law about Divorce is
a new Law, for he repealed
That,

That, if we look to the Law of Creation and first institution of marriage, 'tis the same that was from the beginning, only the Mosaical indulgence had interposed, and our Saviour by repealing That settles the matter upon the old and lasting foundation, wherein Jews and Gentiles, and all men to the worlds end are to acquiesce, and declares that, exception of Fornication, though not expressed to be virtually contained and implied in the institution of marriage from the beginning.

Animad-

Animadversion.

IT is a strong argument to me, that whereas God saith, the nations round about the Jews would admire their wise Laws, yet none of the Heathen had such a loose Law, as to divorce at every exception the husband took.

Answer.

It is a consideration of moment I grant, yet our Saviour giving the reason of it and thereby seeming to admit the thing, determines us ; It was rather a Toleration than

than a Law, a permission of impunity, rather than an institution, and we have good reason to think, as things then stood, the best and most prudent expedient That people were capable of. *Calvin* speaks wisely of it, says he, we give general liberty without restraint for men to go to Law, yet that justifies no mans going to Law beyond the bounds of Charity; *St. Chrysostome* in his excellent Homily upon the 5th. of *Matthew* speaks more fully to th ground of it. *Si enim retineri etiam exosam præcipisset uxorem, facile profectò illam qui ode- rat occidisset, Talis quippè erat*

Divorce, Discussed. 101

erat natio Judaeorum, qui enim ne filiis quidem propriis parcere, & Prophetas solebant frequentèr occidere, ut aquam ita effundentes humanum cruorem, multò illi minus odiosis conjugibus percissent, Moses, inquit, propter duritiam vestram hæc scripsit, ne clam mactaretis sed ejiceretis. The Christian Roman Emperours gave much the same liberty to the Husband; Grotius says, *Christiani Imperatores extra Adulterium aliquot scelera enumerant, quibus probatis, maritus sine ullo damno uxorem repudiet, & quod est amplius, ea si probare nequeat, non simpliciter repudiandum*

*dium vetant, sed in arbitrio
mariti relinquunt, malitne
uxorem retinere, an dotem
reddere, & amittere quod
propter nuptias donavit.*

Animad-

Animadversion.

Matth. 19. 9. *is not every way the same determination with his doctrine, Matth. 5. ; for chap. 19. he speaks in his case that marries another, but Matth. 5. in his case who marries her that is put away.*

Answer.

I conceive both places are alike to this purpose, to make remarriage upon Divorce lawful, for in the 5th. of *Matthew*, remarriage is plainly intended by our Saviour,
for

for he saith, *whosoever puts away his Wife except for Fornication*, which is to be understood such putting away as they Then used, which was to remarry after it, for he sayes expressly, *whoever puts away his Wife and marries another* : and he sayes, *if the woman marry again* (except put away for the cause of Fornication) *she commits Adultery*, the exception plainly implies her remarriage is no Adultery, if put away for Fornication, and if the woman so put away may lawfully marry again, much more the man that did put her away : if it be lawful for either

Divorce, Discussed. 105

to marry, it must needs be
for both, for it must be up-
on supposition of the Mar-
riage-bond dissolved.

The

Animadversion.

IN Matthew there's mention of putting away, not a word to allow the innocent person to marry again : but here is a strong argument indeed, that the Law of Moses never allowed their petulant putting away for every cause; For Christ, as you well observe rendered the right sense of the old Law, gave no new.

Answer.

Answer.

No new Law, if we respect what Law was from the beginning, which the Jews were obliged by, but new in this case, if we respect the permission of *Moses*, for he positively repeals That ; The Law the Jews were to submit to was the Law of Creation and first institution which *Moses* revealed to them, to That our Saviour reduceth them ; The permission about Divorce was accidental and temporary, that our Saviour positively repeals, and 'tis very plain that in Both cases,

cases, That of *Moses* for Divorce, and That of Christ for Divorce, remarriage is admitted; in *Moses*, in *terminis* expressed, and by our Saviour plainly and undeniably implied.

Animsad.

Animadversion.

T*hat Christ intended the obligation of the marriage should cease ; Presumitur non probatur.*

Answer.

Christ must needs intend the obligation of the marriage should cease, where he gives liberty to a second marriage, as he plainly does in case of Fornication, both in the 5th. and the 19th. of *Matthew*. Christ reasons about marriage from the Law of creation, and the first

first institution of it in Paradise, and carries it up to the highest grounds of the obligation, and There gives liberty to Divorce and remarriage in case of Fornication, and therefore Fornication must needs be reckoned a dissolution of the marriage, and a dissolution of it considered in its strictest ties; our Saviour would never have gone about to prove the sacredness of the marriage-bond by the highest Proofs, and then have given liberty to divorce, where the bond of marriage was not directly broken, for in that case his proofs would only have served against his own
indulgence,

Divorce, Discussed. III

indulgence, and therefore he proves the sacredness of the marriage bond to overthrow the Jewish divorces, and establishes divorce in That only case, where the bond it self was dissolved.

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Animad-

Animadversion.

Mark sets down the same story recorded by Matthew, that not to be denyed. Yes, 'tis evidently to be denyed, Matth. 19. 3. The Pharisees asked him about divorce, so Mark 10. 2. the Pharisees asked him about that matter; but read further, verse the 10th; and in the house the Disciples asked again of the same matter, and he saith unto them, whosoever puts away his Wife, and marries another, commits Adultery, Luk, 16. 1. The chapter begins

He

Divorce, Discussed. 113

He saith unto his Disciples, not to the Pharisees ; Then at the 19th. verse, whosoever puts away his Wife, and marries another, commits Adultery ; To his Disciples our Saviour spake in Gospel rules, repealing the license given to the Jews in their Law Judicial to marry again, if Divorced for Adultery ; I dissent from Calvin, who will have the same carriage of the story to be in all the three Evangelists.

Answer.

I humbly conceive that the two Evangelists relate the same story, both from the matter of it, and all the circumstances that attend it, 'tis said in the 19th. of *Matthew*, in the beginning of the Chapter, our Saviour came into *Judaea* beyond *Jordan*, and in the beginning of *Mark* 10. 'tis said he came into the same place, and in both the Evangelists 'tis said the multitude came unto him, and the discourse related between him and the Pharisees appears evidently in both Evangelists to have been the same,

Divorce, Discussed. 115

same, at the same time, and in the same place, and before the same company, only somewhat varied in the relation, which is usual; In the 10th. of *Mark* there is no mention made, that our Saviour gave to the Pharisees any allowance of Divorce in any case, which is expressed in the 19th. of *Matthew*, and 'tis granted our Saviour admitted it to the Jews; what our Saviour saith about it in the 19th. of *Matthew*, was as much spoken to the Disciples, as what he sayes in the 10th. of *Mark*, as appears from hence, that the Disciples themselves make immedi-

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ately

ately the answer; In the 19th. of *Matthew*, where our Saviour saith, *Whoever puts away his wife, except for Fornication, &c.* If the case be so, say the Disciples, taking it to themselves, 'tis good not to marry, looking upon it as a strict doctrine, even with that exception and such a one as the world had not been acquainted with, and which they thought unsupportable. *Calvin* sayes, 'tis the same passage that is reported in *Mark*, only *Mark* reporteth 'twas spoken in the House to the Disciples, and *Matthew* omitting that circumstance sets down barely our Saviours speech;

Divorce, Discussed. 117

speech; *Dr. Hammond* agrees with *Calvin* in this matter, speaking of these places and about this very occasion, says he, that these places, That in *Matthew* on the one side, and in the other two Evangelists, at least in *St. Mark* on the other side, are a report of the same passage of story, and of the same part of Christs speech, appealing from the *Mosaical* permission to the first institution of marriage, there is no ground of making any question, and therefore it follows that one must be interpreted by the other, so thinks he. But suppose it were otherwise, when several

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ral of the Evangelists relate discourses of our Saviour about the same subject, by all judgement of reason those Evangelists that are more explicate and large must interpret those that are more implicate and brief, and there is no fitness at all in it to interpret those that are most large, and say most upon a subject, by those that are more brief and say least of it.

But that which overrules me in this case is, that I find our Saviour no where Preaching one doctrine to the Jews and another to his Disciples, and that must be proved in this case, or else the
the

Divorce, Discussed. 119

the point of Divorce and remarriage is visibly established in case of Fornication, if our Saviour gave that liberty only to the Jews, and made the exception singly for them, Then when he speaks generally to his Disciples, he must not only repeal the liberty *Moses* gave to the Jews, but the liberty which himself gave to the Jews, which is not fit to suppose; Nor indeed has our Saviour throughout the whole Gospel given any one new Law peculiar only to the Jews, which this about Divorce in case of Fornication only must needs be, if it be restrained to

F 5

Then,

Them, for they had no such Law before ; *Moses* permission of Divorce, and this of our Saviour could not be the same, for our Saviour would never have condemned what *Moses* did, and immediately have instituted the same thing himself : Nay, it must not only, if restrained to them, be a new Law to them, but a new Judicial Law, which were strange to suppose our Saviour should Then institute; for if we deny it to be Judicial, and acknowledge it to be (as indeed it is) a Law moral, founded upon mans first Creation and the first institution of marriage,

Divorce, Discussed. 121 -

riage, then it cannot be restrained to the Jews, but must needs by the nature of it belong to all.

Animad-

Animadversion.

THE third Reason *makes* against you. Christ cites original Scripture, light of Nature, grounds not to be shaken but by the God of Scripture and Nature, who indulged to the Jews, that albeit those great obligations, they might marry after Divorce for Adultery; those times of infirmity God winked at, as he did at many things in the superstitions of the Gentiles, but these are the times of reformation under the Gospel.

A n s w e r.

Divorce, Discussed. 123

Answer.

I conceive Christ would never have established marriage upon those grounds, and then have given a dispensation for divorce that those grounds would not admit of ; our Saviours speech must then be thus understood, by the Law of mans first Creation, and the first institution of marriage this divorce for Fornication and remarriage upon it, ought not to be, yet I will give you liberty to do it. Without doubt the divorce our Saviour then allowed was very well corresponding with those

those principles upon which he established marriage, and those principles being general and perpetual, his allowance of divorce must needs be so too; Christs time was no indulging time, not a word in the Gospel of Christs winking at any thing, he settles every thing upon its true and lasting foundation, they are times indeed of reformation, and from whence can we more reasonably expect That reformation than from Christs own mouth; He allows not the Jews in any one Tittle of their corrupt practice, but exactly reduceth them to the rule, and in this case he plainly tells them,
the

Divorce, Discussed. 125

the dispensation they had from *Moses* was not the rule, but the law of Creation and Gods first institution was the rule, and that admits of no exception but this of Fornication : 'tis not reasonable to think Christ should indulge them for the hardness of their hearts in any thing, because he came to reform every thing, but especially not in this matter, because he plainly repeals what *Moses* had done in it before upon that ground.

Animad-

Animadversion.

WHere Fornication is committed, the Union is dissolved. *Gratis dicitur; For may not the innocent person remit the fault of foul lust to the other, deductoſque jugo cogat alieno? may they not live together as Man and Wife? which could not be, if the union were intrinſically diſſolved; As the Prophets do often challenge the Jews for ſpiritual Fornication of Idolatry, yet the Lord*
took.

Divorce, Discussed. 127

took them again to him for his people, and it hath a great Evangelical consideration in it, that for any trespass, while the offended and the offender live together in this world, there may be a way left for reconciliation, and to take that admonition, sin no more lest a worse thing come unto thee: but remarrying another while the offender lives, excludes all possibility of charitable pardon.

Answer.

Answer.

When we say the *vinculum matrimonii* is dissolved, we speak not of actual dissolution, but virtual cause of dissolution; In this and in all other obligations arising from contract, when the bond is broken, 'tis a rule, *Potest innocens cedere Juri suo*, and if the offended will not take the forfeiture, the bond continues: Adultery does not *ipso facto* dissolve the marriage, but gives right to the innocent party to dissolve if he please, puts the power into his hand, which he may *ad libitum* make use of or not,

Divorce, Discussed. 129

not, for as Divines say, *Divortium non est preceptum, sed tantum permissum & probatum*, 'tis a liberty given in favour to him that is wronged in the matrimonial contract, which he is not bound to make use of unless he will; God seems to intimate so much in the Prophet, *Where is the Bill of your mothers divorcement?* there was cause enough, the Covenant was broken on their part, yet God pleased to forgive it and not take the forfeiture, no Bill of Divorce was actually given, if it had, they could have returned no more, the separation had been irremediable.

ble. Now that Fornication in this sense is a dissolution of the marriage-bond, that 'tis a sufficient ground to dissolve it, if the innocent party please, will appear, both from Christs permission about it, and from the nature of the thing it self.

First, From Christs permission about it, he plainly admitted Fornication to be a good ground of Divorce, and permitted remarriage upon that Divorce : let his permission be to whom it will, our Saviour would never have given liberty to any man to remarry upon Fornication, unless That had dissolved the first marriage,
for

Divorce Discussed. 131

for it had been to permit a positive sin upon those very grounds, upon which our Saviour himself in that very place does establish the bond of marriage; If the bond of marriage can be broken in no case, our Saviour would never have allowed putting away and remarrying in any case.

Secondly, From the nature of the thing it self, it cuts the very knot of the marriage-contract, which is, that two shall become one flesh, and in that case two are not one flesh, which they covenant to be, and are to be, in a chaste and peculiar enjoyment of each other in
the

the marriage-bed, for St. Paul sayes, *He that joyns himself to an Harlot is one flesh with her* ; By the marriage contract they have resigned their bodies over each to other, and have not power in that respect over their own bodies; In case of Fornication, there is the highest breach of That obligation.

All other things whatever relating to marriage may be enjoyed upon other accounts and in other relations, but only the body and the concerns of it, and therefore when the Faith about the body is broken, Faith is broken about that which is the peculiar property of marriage,

Divorce, Discussed. 133

riage, and that which does formally distinguish it from all other relations.

A charitable pardoning spirit is very suitable to the Gospel and becoming a Christian, but I think a man ought not to be imposed upon in this case, where a man is wronged, and Christ hath provided a way to right him, justice in That case must not be denyed him, if he require it; A man may, if he please forgive an unclean wife and continue to live with her, But I incline to *Calvins* opinion, that he will do much better to put her away and cleanse his house (nay his bed) from defilement and wickedness.

Animad-

Animadversion.

You say, It is not reasonable, that the obligation of marriage should remain, and the helps and advantages be taken away ; *why, what if the man or woman be taken Captive ? Incur an irremediable disease ? or the Wife, though chaste, will not render due benevolence ? or, her Joynture she brought be consumed by fire ? Here are helps and advantages subtracted, yet no wedlock broken.*

Answer.

Divorce, Discussed. 135

Answer.

I conceive it not reasonable any thing should be thought of validity to take away the ends of marriage that is not sufficient to dissolve the obligation ; because they are relatives intrinsically conjoynd each to other, the ends and advantages of marriage ought never to be suspended, where there is not sufficient ground to dissolve the bond of marriage; because the bond being entred into for the sake of those advantages that belong to it, by the Law of God, and by the Law of Nature, those advantages

G ought

ought never to be denyed, where the bond is continued; our Saviour saith, *Whom God hath joyned, let no man put asunder*, that is, not put asunder as God hath joyned them, and he has joyned them so, that the duties to be performed and the obligation should go together; whoever divides in That kind, I think falls under the Text, if we ground divorce upon our Saviours exception, That is plainly for a total Divorce in that case of Fornication and remarriage after, He divides as God has joyned, from duty and obligation together. A divorce *à mensa & toro* seems unreasonable, because unequal,

Divorce, Discussed. 137

d, equal, and 'tis unequal, be-
l; cause the innocent party is as
d much a sufferer by That as
ut the nocent, and instead of be-
n- ing relieved, is farther punish-
n, ed, and all the help a man has
o, by this partial divorce, that is
m- abused and betrayed by an
ld chaste wife, is, to be put
les into a kind of Matrimonial
lls Purgatory, and be rendred
nd hereby incapable to enjoy,
urs either the advantages of a
for married man, or the freedom
ase of a single man.

When by providential dif-
God abilities in either party, the
and duties of marriage cannot be
di- performed, yet the marriage-
ms bond continues unbroken,
ne though the ends cannot be at-
al, G 2 tained,

tained, this I assent to, but it will not reach this case; Ability to perform is implied in all contracts, providential disability no way cancels the matrimonial obligation, because 'tis entered into with a supposition of them; But although God in his just Judgement, and as a punishment upon both, may bring married persons into such a condition, yet 'tis not a ground for men to make a rule to go by, especially for the offence of one, 'tis There matter of necessity and not of choice, There the ends of marriage cannot be attained, Here they may, only we obstruct them. God does that many times
pro-

Divorce, Discussed. 139

providentially, and Judicially, which we can neither do reasonably nor regularly; 'tis mens duty to submit to God when he takes away those helps marriage affords, but that is no ground for us to take them away, while he continues them. A man obliged by an oath of Allegiance to his Prince may providentially be brought into such a condition he cannot perform it, but That will never warrant us to bring any man into such a condition, where the obligation to a duty is necessary, and the suspension of it is voluntary; It may so fall out, a Prince cannot protect his subjects, nor his

G 3 sub-

subjects obey him, yet the obligations upon both remain, But this will never justify us upon any account to bring things into such a posture. But suppose the woman refuse due benevolence, where there is no disability. I say she lives by so doing in a notorious sin, and 'tis not fit that what is a sin in either party voluntarily to do, Both should be enjoined to do, which they are by divorce *à mensa & thoro*: The woman in that kind is lyable to punishment for not performing matrimonial duties, and in case all means used to reduce her to her duty prove ineffectual, 'tis worthy consideration, whether she

Divorce, Discussed. 141

she may, not at last come under the equity of St. Paul's direction about desertion, which is nothing as I take it, relating to divorce or putting away in that sense our Saviour speaks of it, but a help that the Law of nature (which is ever implied in all divine institutions) affords to an innocent wronged person unjustly forsaken, and actually or perhaps virtually put away, the Apostle says, *A brother or a sister ἡ δὲ ἀδελφὴ* is not enslaved in such a case.

The truth of this whole matter is, our Saviour has in the Gospel established a Law for Divorce and Remarriage in the single case of Fornica-

tion instead of That liberty given by *Moses* under the Law, it must be proved that he intended That part of the Gospel as a rule to the Jews only, which he never intended any other part of it to be, nor does any where say he intended This to be, or else the matter is determined. Amongst the Jews never any Divorce heard of without liberty to remarry, and it was only intended for that purpose. *Calvin* upon that passage (*He that marries her that is put away, commits Adultery*) speaks fully, says he, This sentence hath been most corruptly expounded by many Interpreters, for they thought

Divorce, Discussed. 143

thought generally and confusedly that is was commanded to live sole after Divorcement, so, if the Husband should put away the Adulteress, of necessity They both should live unmarried, as if This were the liberty of Divorcement, only to lye away from the Wife, as if also Christ did not evidently in this case permit That to be done, which the Jews were wont generally to usurp unto themselves according to their own pleasure ; Therefore their error was too gross, for when Christ condemneth him for Adultery that marries her that is put away, 'tis certain that this is to be understood

of unlawful and frivolous Divorcements.

By the Roman Laws all Divorces admitted of a second marriage; In the Christian Church in the beginning it was so: Nor indeed was Divorce ever thought of any where but in order to a second marriage, till this contrivement of a Divorce à *mensa & toro* came in, the effect of which in the Roman Church, where it hath been chiefly practised, has been such as does no way credit it; *Cajetan*, one of their own, is so ingenuous, that upon the 19th. of *Matthew*, he saith, *Intelligo igitur ex hac Domini Jesu Christi lege, licitum esse*

Divorce, Discussed. 145

esse Christiano dimittere uxorem ob fornicationem carnalem ipsius uxoris, & posse aliam ducere; And a little after adds, *Non solum miror, sed stupeo, quod Christo clare excipiente causam fornicationis, torrens Doctorum non admittat illum mariti libertatem.* Wherever that kind of Divorce has been practised, the consequence hath most commonly been, that the innocent party hath by temptation fallen into sin, the offending party into farther transgression; for 'tis not a thing probable or likely, that such who would not live chastely in a married condition, should do so in a single
con-

condition, and at last greater inconveniences and animosities have arisen from such a separation and the parties very rarely if ever again united. It inflaves mankind into a very sad dilemma, either to lye in a polluted bed, and yield to every impudent Adulteress, (for so they usually grow at last, or else to undergo' all those temptations men are subject to without a Wife in a single and unmarried condition : God no where seems to have given the *woman* such an advantage over the Masculine Sex, as to be able to intrap the Man in such a snare.

Animad-

Animadversion.

TO end, such as hold to my opinion, lay it the more to Conscience, foreseeing that the contrary may stir up some wicked Husbands to suborn false witnesses upon Oath to convince innocent Wives, that They being divorced, it may admit them to marry where they like better. Moreover it may fall out, not seldom, that a wicked Woman will confess her self an Adulteress, upon assurance of some ample compensation. More might be added.

Answer.

Answer.

'Tis a thing likewise to be feared, that if no better remedy be provided for innocent Husbands than a Divorce *à mensa & toro*, it may provoke them to rid themselves of their Adulterous Wives by some undue means; the rage of a man is great in those cases, and truly sometimes unconquerable even in good men, sad events have ensued and may ensue in such cases. For suborning proof in this case, there's no more danger than in all other mens estates and lives and their highest concerns depend

Dibozte, Discussed. 149

pend upon proof by witnesses, there is no surer or better ground to proceed upon in all humane determinations, this matter has the greatest advantage against proof of any, being rarely within the reach of it, and for one fact of That nature that can be brought to light by due proof, many will pass in the dark without proof, and so without punishment. A womans own confession in this case will not prevail, the rule in the Civil Law takes place. *Revelanti turpitudinem suam fides non datur.*

In the raign of *Henry* the eighth, when the Popes power was excluded, an Act passed

passed to enable the King to elect thirty two able persons to reform Ecclesiastical Laws; This in the 6 year of *Edward* the sixth's Raigh was put in execution, and the *Quorum* of them by letters Patents reduced to eight, they met and took great pains, there was present *Cramer* Archbishop of *Canterbury*, *Goodrick* Bishop of *Ely*, and other the chief of the Bishops, *Peter Martyr* and other eminent Divines, and the most eminent Canonists, Civilians, and Common-Lawyers then in the Kingdom, they set forth a Book called *Reformatio legum Ecclesiasticarum*, which we may well reckon

Divorce, Discussed. 151

reckon the judgement of the Church of *England* at That time about those things, being composed by such men impowred by the supream Authority, and in That Book the lawfulness of Divorce in case of fornication and re-marriage upon it is fully asserted and justified.

I shall only add, that amongst learned men I find great disagreement in resolving this Question, whether the same right of Divorce belong to the Woman that does to the man ; some say the superiority of the Sex makes this a peculiar prerogative to the man, who is the head of the Woman ; 'Tis certain, in the

the Mosaical Law no such thing as a Womans putting away her Husband was ever allowed, sometimes in fact it was illegally and irregularly practised, yet very rarely, we find in all the Jewish Writers but one instance, and that is in *Josephus* ; The Roman Laws allowed it ; Those who espouse the Womans cause in this point, urge that passage of our Saviour in the 10th. of *Mark*, where he saith (*And if a woman put away her husband, and marry another, she commits Adultery*) and so seems to make the right of putting away equal ; *Calvin* upon this place saith that although the Husband
be

Divorce, Discussed: 153

be superiour in other respects, yet in the marriage-bed the man and the woman are equal, therefore saith he, when as the Adulterer shall fall away from the knot of matrimony, the Wife is set at liberty: they also urge that of *St. Paul*, who saith, in case of desertion a Brother or a Sister is not bound; and so seems to put the matter between Man and Wife upon even terms in all conjugal respects. The Christian Church affords us but two instances that look this way; The first of one *Thecla*, who refused to marry one *Thamyris* in *Iconium*, after she was contracted to him; This story

story Mr. *Selden* relates at large, from the report of *Basil of Selencia*, but seems not much to credit it himself, however it was but a refusing Marriage after contraction, Mr. *Selden* calls her only *Sponsa*, and faith, *Nuptias noluit, & sponsalibus renunciavit*, and it was to one that most bitterly detested Christianity; The other instance is that in the beginning of *Justine Martyrs* first Apology, where a Christian woman made use of the Roman Laws to put away her Husband, and he commends her for it, but that was evidently upon St. *Pauls* permission in case of desertion, for
her

Divorce, Discussed. 155

her Husband was a notoriously wicked person and departed from her.

In this matter I shall make much a better choice, to submit to your Lordships learned Judgement, than to declare my own.

FINIS.

MR. DEINIOL'S LIBRARY,

HAWARDEN.

Editha, Dilettante

her husband was a notorious
only wicked person and de-
parted from her.
In this matter I shall make
much a better choice, to sub-
mit to your Lordship's learn-
ed judgment, than to de-
termine my own.

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